

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS  
EAST ST. LOUIS DIVISION**

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IN RE: PRADAXA (DABIGATRAN	: 3:12-md-02385
ETEXILATE) PRODUCTS LIABILITY	:
LITIGATION	: MDL No. 2385
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	: Chief Judge David R. Herndon
This Document Applies To All Actions	:
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**CASE MANAGEMENT ORDER NO. 35**

**Pre-Identification of Exhibits to be used in Depositions**

**Herndon, Chief Judge:**

**I. Introduction**

The defendants, Boehringer Ingelheim Pharmaceuticals, Inc. and Boehringer Ingelheim International GmbH, have filed a motion asking the Court to enter a case management order requiring the plaintiffs to pre-identify documents the plaintiffs intend to use during depositions at least five days in advance of those depositions (Doc. 177). The plaintiffs contend the defendants' motion is actually a motion to amend the deposition protocol set forth in Case Management Order No. 8 ("CMO 8") and should be denied for lack of good cause (Doc. 186). In support of this argument, the plaintiffs assert the pre-identification of deposition exhibits was discussed during the process of drafting the deposition protocol and, as part of the negotiation process, a provision requiring pre-identification of deposition exhibits was removed from the stipulated deposition

protocol (Doc. 186). Accordingly, the plaintiffs argue, because the defendants are attempting to withdraw their agreement to a stipulated case management order, the motion should be denied (Doc. 186).

In the alternative, the plaintiffs assert the motion should be denied on its merits because it seeks protected work-product. In support of this argument, the plaintiffs point to Case Management Order Number 31 (“CMO 31”). CMO 31 involved the pre-identification of exhibits reviewed by the defendants’ employee witnesses in preparation for their depositions (Doc. 165). In CMO 31, the Court ordered the defendants to produce a list of exhibits reviewed by witnesses in preparation for their depositions at least five days before the deposition (Doc. 165). The Court also specified that opposing counsel was not entitled to know which, if any, documents were selected by defense counsel because an attorney’s selection and compilation of records in preparation for a deposition is subject to work-product protection (Doc. 165).

## **II. Analysis**

### **A. Negotiated Case Management Order**

In complex litigation, stipulated case management orders serve the important public interest of moving the case along, as well as the parties’ private interest in the expeditious resolution of the litigation. As a result, the Court is generally reluctant to grant unilateral requests to modify stipulated case management orders. Certainly, the Court does not want to encourage the practice of one party seeking changes to case management orders that were entered into

voluntarily after extensive negotiations. For this reason, the Court views the defendants' request to modify the agreed upon terms of CMO 8 with great trepidation. At the same time, however, case management orders should not be inflexible. That is, if the agreed upon terms prove to be inefficient or otherwise unworkable in practice, the Court must be able to revise the problematic terms.

In the instant case, the Court is sympathetic to the plaintiffs' contention that the requested pre-identification provision is contrary to terms negotiated by the parties. However, it is also evident that the requested pre-identification provision is critical to ensuring productive depositions. Discovery in this case has resulted in the production of millions of documents. Further, during early depositions, the plaintiffs' have shown witnesses an enormous volume of exhibits, many of which are very long and have never been seen by the witnesses. In light of the enormous volume of documents that have been produced and are likely to be shown to future deponents, pre-identification of exhibits is a necessary step in moving this litigation forward and ensuring the depositions are productive.

#### **B. Attorney Work-Product**

As the Court has explained in previous decisions, an attorney's compilation of documents in preparation for a deposition is subject to work-product protection (Doc. 165). For this reason, in previous orders, the undersigned judge has concluded that plaintiffs' counsel is entitled to know what documents a witness reviewed in preparation for his or her deposition so long as plaintiffs' counsel does not inquire into which of the reviewed documents were selected by

opposing counsel (Doc. 165). The present issue, however, is distinguishable. At issue here, are documents the plaintiffs' attorneys intend to use as exhibits during depositions – for the reasons discussed below –this fact significantly alters the Court's work-product analysis.

The directive of the Federal Rules is to eliminate surprise from litigation and requires that courts construe them reasonably to facilitate this goal and maximize the pretrial exchange of materials. Accordingly, parties are generally required to disclose a list of documents they intend to use as exhibits during trial months before trial. In the Court's opinion, the compilation of documents intended for use during a deposition is indistinguishable from the compilation of documents intended for use during trial. Therefore, the Court feels that the compilation of such documents is not entitled to work-product protection.

However, if such a compilation is entitled to work product protection, it is only entitled to protection as "fact" work product (as opposed to "opinion" work product). This is because documents intended for use as exhibits during a deposition will inevitably be revealed to opposing counsel. Therefore, an attorney who intends to use documents as exhibits during a deposition cannot have a justifiable expectation that the mental impressions revealed by the selection of those documents will remain private.

Unlike opinion work-product, fact work-product may be discoverable if the requesting party demonstrates a substantial need for the information and that it would be exceedingly difficult to obtain the information any other way. See

Federal Rule of Civil Procedure 26(b)(3). In this case, the defendants have produced over 10 million pages of documents and as many as 200 exhibits are being shown to deponents during depositions. Considering this incredibly large volume of documents, the depositions cannot be productive absent pre-identification of the documents the plaintiffs intend to use as exhibits during depositions. This demonstrates a substantial need for disclosing the documents the plaintiffs intend to use as exhibits during depositions. Accordingly, the attorney work-product doctrine (if it is applicable) does not prevent the Court from ordering the plaintiffs to make known in advance the documents they plan to use at depositions.

### **III. Conclusion**

Considering the above, the Court finds that the compilation of documents the plaintiffs intend to use during depositions is discoverable in advance of the depositions. Therefore, the Court **ORDERS** the plaintiffs to produce a list of documents they intend to use during a deposition **three days** in advance of the deposition. This will give the plaintiffs two days to consider the documents defense witnesses reviewed in preparation for his or her deposition (disclosed five days in advance of the deposition) and determine what documents the plaintiffs intend to use at that witnesses deposition.

**SO ORDERED:**

 Digitally signed by  
David R. Herndon  
Date: 2013.05.14  
18:08:49 -05'00'

**Chief Judge**  
**United States District Court**

**Date: May 14, 2013**